HIGH COURT OF CHHATTISGARH AT BILASPUR

Civil Revision No.207/2003

Single Bench:	**Hon'ble Shri Dilip Raosaheb Deshmukh, J.**
Applicant **Plaintiff**	Ashok Kumar Mehta, S/o Popatlal Mehta, Aged about 52 years, R/o Darogapara, Raigarh (C.G.)
	Versus
Respondent **Defendant**	Ram Niwas, S/o Chandulal Sharma, Aged about 57 years, R/o Dabra Road, Kharsia, District-Raigarh (C.G.)

MEMO OF REVISION PETITION UNDER SECTION 115 OF THE CODE OF CIVIL PROCEDURE

Present: - Shri H.S.Patel, counsel for the applicant.
Shri S.N.Nande, counsel for the respondent.

ORAL ORDER
(Passed on 23rd April, 2007)

Heard on I.A.No.5863 of 2003 which is an application for urgent hearing.

(2) Considered and allowed. Matter is taken up on board.

(3) Learned counsel for the parties pray that this Civil Revision be disposed of finally today at the stage of admission.

(4) This Civil Revision was finally heard today at the stage of admission.

(5) The applicant/plaintiff is aggrieved by an order dated 06-05-2003 passed by the 2nd Additional District Judge, Raigarh in M.J.C.No.04 of 1995 whereby upon an application under Order-9 Rule-13 read with Section-151 of the Code of Civil Procedure having been filed by the non-applicant/defendant herein the *ex parte* judgment and decree dated 11-08-1994 passed in Civil Suit No.19-A of 1994 was set aside.

(6) Brief facts are that the appellant/plaintiff-Landlord filed Civil suit No. 19-A of 1994 for eviction against the respondent/defendant-tenant before the 2nd Additional District Judge, Raigarh. On 07-05-1994, the Court ordered issuance of notice to the respondent/defendant herein. On 11-05-1994, notice was issued to the respondent/defendant. On 17-05-1994, the Process Server–Udhav Ram went to Kharsia for service of notice. Ram Niwas, the respondent-defendant herein was not at home. Process Server-Udhav Ram asked Bhagwani, wife of Ram Niwas, the respondent/defendant herein to take notice who refused. The notice was served by affixture and returned on 23-05-1994 with an endorsement of refusal by the wife of the respondent/defendant. The Court proceeded *ex parte* against the respondent/defendant and passed an *ex parte* decree on 11-08-1994.

(7) The respondent/defendant moved an application on 13-02-1995 under Order-9 Rule-13 read with Section-151 of the Code of Civil Procedure before the 2nd Additional District Judge, Raigarh for setting aside the *ex parte* decree on the ground that he had gone to Ambikapur to attend a relative's marriage from 15-05-1994 to 18-05-1994 which was allowed by the impugned order. Hence, this Revision.

(8) It is not disputed that on 17-05-1994 when Process Server-Udhav Ram went to Kharsia for effecting the service of notice, the respondent/defendant was not available at his residence. Report of the process server was reproduced in para 8 of the impugned order which is as follows:-

> "खास साकिन खरसिया स्टेट बैंक के ऊपर रामनिवास शर्मा आ0 चंदु लाल शर्मा का पता लगाया तो उसकी पत्नी से पता चला कि ट्रक के काम से बाहर गया है । घर पर शामिल शरीक उसकी पत्नी उम्र करीब 45 वर्ष की हाजिर थी, उसे समंस लेने के लिए कहा तो वह देख पढ़ कर समंस लेने को साफ–साफ इंकार की इसलिए पेशी तारीख बताकर एक प्रति में

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अर्जी नकल के साथ रामनिवास शर्मा के खुले मकान के आम दरवाजे पर चस्पा किया । चस्पा तामिल करवाया, वापस आया ।"

(9) The above endorsement does not show that the process server had used due and reasonable diligence in enquiring about the house of the defendant or for ensuring the identity of the lady who refused to take the summons. It also does not show that any independent witness of the locality was present at the time when service by affixture was made upon refusal by the defendant's wife. It also emerged in the testimony of the process server that the lady had said that Ram Niwas was not at home and therefore she would take the summons after Ram Niwas returned home. In fact, this does not amount to refusal and shows that the process server did not use due and reasonable diligence to serve the summons on the defendant personally as required by Order-5 Rule-15 C.P.C.

(10) In para-23 of the impugned order, it was clearly mentioned by the Court that Process Server-Udhav Ram had admitted that he did not make any enquiry from the lady who emerged from the house on his call. He also admitted that he did not ask any neighbourer or villager about Ram Niwas, the respondent/defendant herein and returned the summons with an endorsement of refusal by the wife of respondent/defendant. Under Order V Rule 17 of the C.P.C., the Process Server ought to have used all due and reasonable diligence in enquiring about the defendant and also about the identity of the lady on whom he intended to serve the notice. In the absence of exercise of such due and reasonable diligence, which was expected from the Process Server, there is a clear violation of Order-5 Rule-18 of the Code of Civil Procedure which provides that the serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons. In this view of the matter, relying upon a decision

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rendered by this Court in a similar situation in ***Kunjlal Vs. Khorbehreen Bai & others*** reported in ***2005(2)C.G.L.J. 368*** and ***Ashok Kumar Sahu Vs. Madhusudan*** reported in ***2007(1) C.G.L.J. 314,*** I am of the considered opinion that the learned 2nd Additional District Judge, Raigarh was justified in allowing the application under Order-9 Rule-13 read with Section-151 of the Code of Civil Procedure and setting aside the *ex parte* decree passed in Civil Suit No.19-A of 1994.

(11) In the result, this Civil Revision has thus no merit and is dismissed at the stage of admission. There shall be no order as to costs.

Sd/-
Dilip Raosaheb Deshmukh
Judge